STATE OF WISCONSIN CLAIMS BOARD

The State Claims Board conducted hearings in the State Capitol, Room 424NE, Madison, Wisconsin on May 14, 1998, upon the following claims:

Claimant	Agency	Amount
1. Marilyn K. Stevenson	University of Wisconsin	$9,403.40
2. Kevin H. Ward	Natural Resources	$3,000.00
3. William E. Stieglitz	Agriculture, Trade & Consumer Protection	$12,000.00
4. Rodney Feltz	Transportation	$3,475.00
5, James Cape & Sons, Co.	Transportation	$1,277,306.00
6. Life Underwriters PAC/WI Assoc. of Life Underwriters	Ethics Board	$3,100.00

In addition, the following claims were considered and decided without hearings:

Claimant	Agency	Amount
7. Robert L. Beavers	Corrections	$5,598.40
8. Mya L. Haessig	Corrections	$63.23
9. Rosemary M. Flanum	Natural Resources	$1,563.25
10. George Bolwerk	Natural Resources	$409.79
11. Timothy L. Kelso	Revenue	$2,438.22

In addition, the following claim, presented at a previous hearing, was considered and decided:

Claimant	Agency	Amount
12. Daniel J. Price	Dodge Co. District Attorney	$8,280.64

The Board Finds:

1. Marilyn K. Stevenson of Madison, Wisconsin claims $9,403.40 for medical expenses and lost wages allegedly incurred due to a fall at the South East Recreational Facility (SERF) at the University of Wisconsin—Madison. On Friday, September 27, 1996, the claimant was voluntarily assisting a class at the SERF pool. Before entering the pool, the claimant went to a storage/equipment closet next to the pool area to retrieve kick boards for the class. After entering the storage room, the claimant slipped and fell on a pool of water. She fell backwards and fractured her right wrist. When the claimant entered the storage closet she was wearing a dry swimsuit and foot thongs. There were no signs warning that the floor in the closet might be wet or slippery. The claimant alleges that the UW failed to properly maintain the premises and failed to use reasonable diligence in inspecting the storage closet in order to discover and remedy the dangerous condition of the floor. The claimant requests reimbursement of her medical bills in the amount of $5,373.40. The claimant is self-employed as a housekeeper and also requests reimbursement of lost wages in the amount of $4,030 because she was unable to maintain her normal workload from the date of her injury until April 1997. The University of Wisconsin recommends denial of this claim. The claimant filed a lawsuit based on this same

incident, Stevenson v. University of Wisconsin and Timothy Gattenby, Case No. 97CV1942 (Dane County Circuit Court). That matter was dismissed, without prejudice, on December 23, 1997. As to the University, the dismissal was based on sovereign immunity. As to the UW's employe, Mr. Gattenby, the court determined that the claimant failed to allege circumstances warranting an exception to the general rule of immunity and failed to state a claim upon which relief could be granted. Since this is not a matter involving the negligence of any state employe, and there is no equitable basis for payment, the UW recommends the claim be denied. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

2. Kevin H. Ward of Madison, Wisconsin claims $3,000 for attorney's fees incurred due to a defamation lawsuit. In December 1996, the claimant called the Department of Natural Resources tip line to report illegal hunting activity. The claimant stated that he had seen two men hunting deer and turkey and he further stated that one of the hunters was Paul Roehrig. DNR conservation wardens obtained a search warrant for Mr. Roehrig's home; however, no evidence was discovered to corroborate the allegations of illegal activity. Mr. Roehrig then filed a civil action against the claimant for defamation and slander. This action was dismissed, with prejudice, when the claimant agreed to sign a statement attesting that he was mistaken in his identification of Mr. Roehrig as one of the hunters. The claimant believes that the DNR should assist him, since the DNR relies heavily on tip information from private individuals to discover illegal hunting activity. The Department recommends denial of this claim. The state is not legally liable for the claim and the DNR does not believe the circumstances warrant payment on equitable grounds. The claimant gave law enforcement personnel information that could not be corroborated. He has now acknowledged in writing that he was mistaken and that the information he provided was erroneous. The DNR cannot support payment of a claim on equitable grounds for attorney fees for defending an action based upon information that was acknowledged by the claimant to be erroneous. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

3. William E. Stieglitz of Greenwood, Wisconsin claims $12,000 for reimbursement for an elk destroyed due to a routine tuberculosis test required by the State. The elk was deemed a suspect during a routine test to accredit the claimant's heard as tuberculosis-free in September 1997. The elk was immediately tested again using a CCT test and she reacted at a level that resulted in her being classified as a suspect. According to the claimant, he was informed at that time by Dr. Tim Deveau, that routine worming shots might result in a false positive reaction to the TB test and to avoid further worming. The claimant asked about doing a BTB test and was told that it was not an accepted test. The elk was tested again in December 1997 and reacted at a level that resulted in her being classified as a reactor. Because of this reaction, the elk had to be destroyed. The claimant believes that an increase in liver flukes, due to the reduced worming, caused the elk to react to the TB test. The claimant also alleges that the elk would have been proven non-reactive, had she been tested using a BTB test. The claimant states that the elk, who was purebred and registered with the North American Elk Breeders Association, was tame, hand-raised, bottle-fed, and had a calming effect on the entire herd. She was young and pregnant at the time she was destroyed and the claimant alleges that she would have lived at least 12 more years, producing calves valued at $4,000 to $6,000 each. Given this information, the claimant has valued the elk at $12,000 and requests reimbursement in that amount. The Department of Agriculture, Trade & Consumer Protection recommends denial of this claim. Both the federal Tuberculosis Eradication in Cervida Uniform Methods and Rules (UMR) and the Wisconsin

Administrative Code s. ATCP 10.67(1), require three consecutive official TB tests of all eligible animals in the herd establishing no evidence of bovine TB before the herd can be accredited TB-free. The claimant wanted a BTB test conducted after the CCT test, however, ATCP 10.66(8), Wis. Admin. Code does not allow for a BTB test after a CCT test has been conducted. The elk in question classified as reactor in December 1997. Once she did so, Both the UMR and the Administrative Code require that she be killed. Dr. Tim Deveau, who performed the 1997 CCT test, is a veterinarian employed by the USDA. He followed the dictates of both the UMR and ATCP 10.66(1), Wis. Admin. Code, and there is no indication that he was negligent, therefore, the board should not award this claim based on alleged negligence by a state employe. The claimant has received the statutory indemnity of $1500 for this animal. $1500 is the statutory limit on the amount of money paid out for indemnity, regardless of the pedigree of the animal. The Department believes that, in fairness to other farmers who have had animals slaughtered and have been limited to $1500 indemnity, the Claims Board should deny this claim. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

4. Rodney Feltz of Marshfield, Wisconsin claims $3,475 for damages to vehicle allegedly caused by a State Trooper during a vehicle inspection. In July 1996, the claimant brought the vehicle to the Marshfield Police department for a salvage title vehicle inspection. The claimant alleges that the Trooper who inspected the vehicle dented the fender and also chipped paint on the hood. The claimant states that the Trooper pried off the VIN tag and tore the inner fender away from the vehicle to inspect the hidden ID number. The claimant does not feel this was justified because the VIN tag was not loose and the vehicle was a low-mileage, family car with a low theft rate. The claimant also alleges that without using the proper testing equipment, the Trooper determined that the window tinting was not legal and told the claimant it would have to be removed. The Department of Transportation recommends denial of this claim. Trooper Albers performed the salvage vehicle inspection on the claimant's car. During the inspection, Trooper Albers noticed that one of the rivets holding the VIN tag in place was inserted at an angle. Applying slight pressure to the VIN tag, as trained, caused it to easily pop off, raising suspicion that the VIN tag had been replaced. The Trooper followed proper procedure and inspected the secondary VIN number location— behind the fender. In order to accomplish this, the Trooper carefully removed the inner fender lining. Trooper Albers states that he did not tear the inner fender away from the vehicle. The Trooper admits that he had not noticed the dent in the fender prior to the inspection, however, he has no recollection of causing the dent. Trooper Albers has stated that the paint chip on the hood was most likely caused by opening and shutting the hood, which was not properly aligned with the fenders, as is common on salvage vehicles. Trooper Albers denies that he told the claimant to remove the window tinting. He states that gave the claimant the choice of either providing certification that the tint was legal or having the tinting removed. The claimant chose to have the tinting removed. The claimant has sold the vehicle for $4300, without making any of the repairs for which he is requesting reimbursement. Furthermore, he has not submitted any documentation to verify his purchase price of the vehicle and substantiate that he has suffered a loss due to the alleged damage to the vehicle or the alleged depreciation in value related to the VIN tag removal. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

5. James Cape and Sons, Company of Racine, Wisconsin claims $1,277,306 for increased costs allegedly incurred during a highway construction project for the Department of Transportation between June 1992 and August 1994. The claimant alleges that it incurred increased costs because of inconsistent and conflicting directives from the DOT, DOT's failure to direct Excavation Below

Subgrade as required by the contract, design errors, changes, and DOT's failure to permit the claimant to prosecute all of the work in 1992 as required by contract. The claimant requests $1,277,306 compensation for increased costs. The Department recommends denial of this claim. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

6. Life Underwriters PAC and Wisconsin Association of Life Underwriters of Madison, Wisconsin claim $3,100 for recovery of a forfeiture imposed by the State Ethics Board. The claimant, a lobbying principal, forfeited $3100 for making campaign contributions through a political action committee, outside a "window period" established by the Ethics Board. The Ethics Board imposed this forfeiture based on an opinion that a PAC, which is established by a principal, may only contribute to a candidate during a "window period" between June 1 and the date of the general election. On February 23, 1994, the Dane County Circuit Court struck down the Ethics Board ruling with regards to the window period campaign contributions, finding that a PAC was not barred from making contributions outside this period because a PAC does not come within the definition of either lobbyist or principal and therefore is not subject to restrictions imposed on lobbyists or principals. The claimant's situation is the same as that in the referenced case, therefore, the claimant requests return of the forfeiture imposed by the Ethics Board, plus interest at the legal rate measured from July 24, 1994. The Ethics Board recommends denial of this claim. This claim is essentially identical to a claim previously filed by the Milwaukee Police Association. The Claims Board denied that claim at its October 14, 1997 meeting. In order to avoid a full investigation by the Ethics Board, the claimant accepted the Board's settlement offer and voluntarily paid the $3,100 forfeiture. The claimant had every opportunity to allow a full investigation and to present its legal and factual arguments to an independent hearing examiner. The claimant could have sought review of any adverse decision in the Circuit Court and raised the same legal issue raised in other cases; it chose not to do so. Rather, the claimant now seeks to substitute the Claims Board as its preferred forum to obtain what it could not achieve in a settlement and was unwilling to try to achieve through statutory procedures. If the Claims Board permits the claimant to circumvent regulatory agencies in this way, then any litigant in a civil action to which the State is a party could foreclose an agency from fully investigating the facts, settle a claim, and appeal to the Claims Board. The Ethics Board believes the Claims Board should follow its own precedent and reject this claim. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. (Member Albers dissenting. Members Lee and Simonson not participating.)

7. Robert Beavers of Eau Claire, Wisconsin claims $5,598.40 for lost wages related to his transfer from a minimum security correctional facility to a medium security facility. This transfer occurred in response to an emergency administrative rule, effective December 8, 1988, which stated that all inmates with life sentences should be placed in medium or maximum security facilities. The claimant, who was serving a life sentence, had been assigned minimum security status since April 1987, because of his good behavior and work record. At the time of the transfer, he had worked as a firewood worker for two years and was earning $250 per month. Because of the emergency rule, the claimant was transferred to a medium security facility, where he was assigned to work in the tailor shop at a much lower rate of pay. Inmates, including the claimant, filed a lawsuit against the Division (now Department) of Corrections regarding the emergency rule. In 1990, Dane County Circuit Court ruled that the rules enacted by Corrections were illegal and ordered the restoration of minimum security status to all life sentence prisoners who had been reclassified. The claimant was transferred back to Oregon Correctional, where he resumed his previous job at his prior rate of pay. The claimant

requests reimbursement of the difference in the amount that he was paid as a medium security inmate and the pay that he would have continued to receive had he remained a minimum security inmate at Oregon Correctional. The Department recommends denial of this claim. The Dane County Circuit Court decision was reversed by the Court of Appeals. Burrus v. Goodrich, 535 N.W.2d 85, 194 Wis.2d 655 (Ct.App. 1995), which sustained the rules and rejected the plaintiffs' (such as the claimant) assertions that the rules violated their ex post facto rights. The Supreme Court denied the petition for review on August 28, 1995. In other words, there is no legal basis for the claim. There is also no equitable basis for the claim. The claimant received a life sentence for First Degree Murder and was not entitled to serve as much of it in minimum security as he would have liked. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

8. Mya L. Haessig of Racine, Wisconsin claims $63.23 for reimbursement for a car radio antenna. The claimant is employed by the Department of Corrections. In August 1996 she was conducting probation and parole home visits. When she returned to her car, the antenna was badly bent, so much so that it later broke off. The claimant is required to do home visits as part of her job duties with the Department. Agents can use state vehicles for these visits, however, the claimant alleges that they are frequently unavailable. The claimant states that she uses her own car for home visits because of the shortage of available state vehicles. While she agrees that there is no evidence that the criminal knew she was a probation and parole agent, the claimant feels that the state is responsible for the damage since it occurred while she was conducting state business. The Department recommends denial of this claim. Although the claimant's car was parked in the neighborhood because she was conducting home visits, that connection with the Department's business is too remote to justify requiring DOC to reimburse the claimant for the cost of replacing her antenna. There is no indication that the antenna was bent because the criminal knew she was a probation and parole agent. The damage is unfortunate, however it is not directly related to her employment; it could have happened to any other car parked in the neighborhood. The state should not be required to act as an insurer for its employes. A random crime was committed and there was no negligence on the part of the Department. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

9. Rosemary M. Flanum of Sturgeon Bay, Wisconsin claims $1,563.25 for medical expenses incurred due to a fall at Ottawa Park. In August 1997, while visiting the park, the claimant allegedly tripped over a support post of a picnic table and fell, breaking her wrist. The bench on the table was missing, and the claimant states that she tripped on the exposed support post when she went to remove something from the table. The claimant states that she had been in the area for about an hour and had not consumed any alcohol. She does not have medical insurance to cover her expenses and requests reimbursement for her medical bills. The Department of Natural Resources recommends denial of this claim. The picnic tables in the Ottawa Lake picnic area had been inspected less than 1 week prior to the accident, pursuant to the park's routine inspection program. The bench was removed by unknown persons sometime after that inspection and had not been reported to park personnel. It is clear that the state is not legally liable for this accident. Section 895.52, Stats., provides that the state has no liability to persons engaged in recreational activities in state parks and forests, in the absence of an malicious act or failure to warn against known unsafe conditions occurring in areas designated for recreational activity. In absence of legal liability or other information relating to the existence of special circumstances that would differentiate this claim from other situations covered by the recreational immunity statute, the Department believes the claim should be denied. The Board concludes there has

been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

10. George Bolwerk of West Bend, Wisconsin claims $409.79 for cost of repairing an air conditioner and replacing a clock and coffee maker, which were allegedly damaged while he was camping at the Kettle Moraine State Forest in August 1997. The claimant contends that the electrical outlet at the campsite he used was incorrectly wired and caused damage to the appliances in his camper. The claimant requests reimbursement for his damages. The Department of Natural Resources recommends payment of this claim based on equitable principles. Although the state has no legal liability in this situation, the DNR acknowledges that the claimant's damages were caused by faulty wiring at the campsite and that the claimant was without fault in this situation. Department staff spoke with the contractor who installed the electrical outlet in an attempt to have him pay for the damages but he has refused to cooperate. The DNR recommends payment of this claim in the amount of $409.79. The Board concludes the claim should be paid based on equitable principles. The Board further concludes, under authority of s. 16.007 (6m), Stats., payment should be made from the Department of Natural Resources appropriation s. 20.370(1)(mu) , Stats.

11. Timothy L. Kelso of De Forest, Wisconsin claims $2,438.22 for reimbursement of income tax overpayment garnished from his wages. The claimant failed to file a personal income tax return for 1992. An estimated assessment was issued in November 1994 and certification of the claimant's wages began in 1996. The claimant filed his 1992 return in July 1997. His completed return indicated that he only owed $25 tax, however, by that time, $2,463.22 had been certified from his wages to satisfy the delinquent assessment. The claimant requests reimbursement of the overpaid amount, minus any late fees assessed by the Department. The Department of Revenue recommends denial of this claim. Section 71.75(5), Wis. Stats., prohibits the department from refunding the amount that was collected on the original assessment, since no refund was claimed within the prescribed two-year time period. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles.

12. Daniel J. Price of Oshkosh, Wisconsin claims $8,280.64 for damages related to alleged lack of action by the Dodge County District Attorney's office in regard to his wage claim against BMI-Cherokee Ltd. On December 6, 1996, DILHR's Labor Standard Bureau determined that BMI-Cherokee Ltd., owed the claimant $8,483.64 for business expenses that were incurred during his employment with that business. The case was referred to the District Attorney's office. The District Attorney informed the claimant that he was on a list of creditors as part of the corporation's liquidation, that there would be payment against his wage claim and there was no reason to file in small claims court. The claimant received a settlement check for $203.60, which was typical of the 2.4% for all unsecured creditors. The order of priority for outstanding liabilities clearly states that wages take precedence over unsecured creditors, however, BMI's attorneys proclaimed this claim as unsecured credit, contrary to DILHR's determination. The District Attorney took no action to correct this situation and uphold the claimant's wage claim. The claimant believes it was negligent for the District Attorney's office not to pursue this matter and requests payment of the balance of his wage claim. The Dodge County District Attorney's office recommends denial of this claim. The District Attorney's office was informed by BMI's attorneys that $203 was all the money available for the claimant's claim. The District Attorney's office determined that the money owed to the claimant could only be collected from BMI, not from its officers, who were also named in the action. There was not anything else the DA's office could do to collect the money, as the BMI had liquidated and

appeared to have no more available funds. The Assistant District Attorney working on this case exercised her discretion in choosing not to pursue court action, as it appeared futile. The claimant could still file a civil action against BMI, but it does not appear that he would be successful, as the company is defunct. The District Attorney's office exercised proper discretion in determining whether or not to file a court action against BMI and should not be held responsible for that company's debts. The Board concludes there has been an insufficient showing of negligence on the part of the state, its officers, agents or employes and this claim is not one for which the state is legally liable nor one which the state should assume and pay based on equitable principles. (Member Albers dissenting.)

The Board concludes:

1. **The claims of the following claimants should be denied:**

   Marilyn K. Stevenson
   Kevin H. Ward
   William E. Stieglitz
   Rodney Feltz
   James Cape and Sons, Company
   Life Underwriters PAC/WI Association of Life Underwriters
   Robert L. Beavers
   Mya L. Haessig
   Rosemary M. Flanum
   Timothy L. Kelso
   Daniel J. Price

2. **Payment of the following amounts to the following claimants is justified under s. 16.007, Stats:**

   George Bolwerk $409.79

Dated at Madison, Wisconsin this 27th day of May 1998.

Alan Lee, Chair
Representative of the Attorney General

Edward D. Main, Secretary
Representative of the Secretary of Administration

Timothy Weeden
Senate Finance Committee

Sheryl Albers
Assembly Finance Committee

Stewart Simonson
Representative of the Governor